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SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. A-121

JOSEPH CIVITA,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Blanchard Press, Inc., Boston, Mass. — Law Printers

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, Joseph Civita, prays that a writ of ceriorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered July 9, 1975, affirming his conviction under 18 U.S.C. §922(a)(6) and §2 and 18 U.S.C. §922(a)(1) and §2, and that on hearing the judgment of conviction be reversed.

Opinions Below

The judgment of the Court of Appeals is not yet reported, but a copy of the Court's opinion is herein attached and marked Appendix A.

Jurisdiction

The judgment of the Court of Appeals was entered on July 9, 1975. This Court has jurisdiction under 28 U.S.C.A. 1254(1).

Questions Presented

1. Did the trial Judge err in admitting into evidence a statement given by the defendant to Agent Timothy Ready?
2. Did the trial Judge err in denying the Defendant's Motion for Acquittal?
3. Did the trial Judge err in certain portions of the trial?

Constitutional and Statutory Provisions Involved

1. Fourth Amendment to United States Constitution.
2. Fifth Amendment to United States Constitution.
3. Fourteenth Amendment to United States Constitution.

Statement of the Case

On February 7, 1975, the defendant, along with a co-defendant, Robert F. Nesto, was indicted by the Federal Grand Jury sitting in Boston. The defendant was named in two counts of a fifteen count indictment, Cr. 74 21. More particularly, the defendant was named in Count 13 of said indictment, which alleges in substance that the defendant did knowingly and willfully aid and abet Robert F. Nesto to commit the crimes described in Counts I through XII, and they allege that Nesto did knowingly make a false and fictitious statement and did exhibit false and fictitious identification to deceive the dealer in firearms, etc. Count

XV alleges in essence that the defendant did knowingly and willfully aid and abet Nesto to commit the offense described in Count XIV of said indictment which accuses Nesto of engaging in the business of dealing in firearms. Pre-trial motions were filed on behalf of the defendant, hearings were held on the said motions and rulings made. For the purpose of this appeal, no further reference will be made to the pre-trial motions. On November 19, 1974, the defendant's trial commenced in the United States District Court for the District of Massachusetts before Judge Skinner and Jury. After somewhat lengthy deliberations, on November 21, 1974, the jury returned a verdict of guilty as to both counts in the indictment that named this defendant. The defendant seasonably and within the time prescribed filed his notice of appeal with the Clerk of the United States District Court, District of Massachusetts. During the course of the trial referred to, the defendant filed a motion at the conclusion of the Government's case for Acquittal which was denied. (Tr. Vol. LL, pp. 172-178)

On January 2, 1975, the Defendant was committed to the custody of the Attorney General or his authorized representative for a period of two (2) years. Execution of sentence was stayed pending appeal.

The conviction by the jury was affirmed by the Court of Appeals for the First Circuit, as previously noted and it is from this affirmance of the conviction and sentence that your petitioner seeks review and outright reversal of the conviction.

Reasons for Granting the Writ

1. Petitioner's Fifth Amendment rights as enumerated in the Constitution of the United States were violated by the allowance into evidence of a statement obtained from him by one Agent Timothy Ready of the Bureau of Alcohol,

Tobacco and Firearms, Department of the Treasury. A heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. *Escobedo* v. *State of Illinois*, 378 U.S. 478, 490, n. 14, 84 S. Ct. 1758, 1764, 12 L.Ed. 2d 977. This Court has always set high standards of proof for the waiver of constitutional rights, *Johnson* v. *Zerbst*, 304 U.S. 458 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) and we reassert these standards as applied to in-custody interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders. *Miranda* v. *Arizona*, 384 U.S. [illegible]6, 86 S.Ct. 1602.

An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. A statement we made in *Carnley* v. *Cochran*, 369 U.S. 506, 516, 82 S.Ct. 884, 890, 8 L.Ed. 2d 70 (1962) is applicable here.

2. Petitioner's Fourth and Fourteenth Amendments guarantee to due process of law were violated on more than one occasion during his trial. The Government's sole allegation of the defendant's culpability and accordingly his guilt was in that the petitioner furnished a co-defendant with a blank pistol permit form. No knowledge by the petitioner was shown to exist of the subsequent criminal conduct of the co-defendant. The co-defendant pleaded guilty to that portion of the indictment that alleged his illegal activities but did not testify against the petitioner.

> "For person to 'aid and abet' another in commission of crime, it is necessary that he associate himself with the unlawful venture, that he participate in it with desire of accomplishment and that he seek by his action to make it succeed." *Peterson* v. *United States*, 405 F.2d 102 (8th Cir. 1968).

This transcript is bare of any testimony that remotely could constitute an association between the petitioner and co-defendant, or that in any way the petitioner participated or desired the accomplishment of the commission of a crime.

> "Aiding and abetting as used in this section, means to assist the perpetrator of a crime." *United States* v. *Harris*, (C.A. Okl. 1971) 441 F.2d 1333.

> "The sine qua non of aiding and abetting is guilty participation by the accused." *Bailey* v. *United States*, (1969) 416 F.2d 1110.

3. The United States Constitution guarantees as to your petitioner's rights to due process of law as more particularly enumerated in the Fourth, Fifth and Fourteenth Amendments, were continually violated by the trial Judge's charge to the jury. The failure of the trial Judge to instruct the jury on what constituted willfully and knowingly, clearly was violative of the petitioner's rights. Further erroneous instructions were given to the jury as to what jurors could infer and what constituted probable consequence.

The charge read as a whole was unfair, improper and illegal. It failed to take into account the essential elements of the crimes alleged to have been committed by the petitioner. To instruct the jury, as the trial Judge did in this case, that the sole official purpose of a permit is to buy

a pistol; that the act of giving the pistol permit, as in lighting a firecracker, allows only one reasonable inference, i.e., that the defendant intended it to be used for that purpose and that the intent or state of mind coupled with the several acts of Nesto was sufficient to warrant guilty findings even though there was no evidence that the defendant participated in or was even aware of the acts set forth in Counts 1-13 and Count 14.

Wherefore, your petitioner respectfully requests that this Honorable Court allow his petition for a Writ of Certiorari for the reasons contained herein.

Respectfully submitted,

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357-5360
Attorney for Petitioner

APPENDIX A

NOT FOR PUBLICATION

United States Court of Appeals
For the First Circuit

No. 75-1020

UNITED STATES OF AMERICA,

APPELLEE,

v.

JOSEPH CIVITA,

DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
(Walter Jay Skinner, District Judge)

Before COFFIN, *Chief Judge*,
McENTEE and CAMPBELL, *Circuit Judges*.

Alfred E. Nugent with whom, *Dolbec, Nugent & Worthington* was on brief, for appellant.

Henry Hammond, Assistant United States Attorney, with whom *James N. Gabriel*, United States Attorney, was on brief, for appellee.

July 9, 1975

CAMPBELL, *Circuit Judge*. After a Jury trial Civita was convicted on two counts for violations of federal gun control laws. Civita was charged in both counts as an aider and abettor of one Robert Nesto. *See* 18 U.S.C. § 2. The first count charged a violation of 18 U.S.C. § 922(a)(6), Civita having allegedly furnished Nesto with a stolen

Massachusetts license to carry firearms which Nesto used in connection with the acquisition of twelve firearms, in violation of the same statute. The second count also alleged the furnishing to Nesto of the stolen Massachusetts license to carry firearms; however, in this count Civita was said thereby to have aided and abetted Nesto in engaging, unlicensed, in the business of dealing in firearms in violation of 18 U.S.C. § 922(a)(1).

Civita contends that the district court erred in allowing into evidence a statement (reproduced as an Appendix hereto) made after his arrest to federal agent Ready. He argues that he did not knowingly and intelligently waive his privilege against self-incrimination, and that any purported waiver was involuntary because the statement was induced by Ready's promises and threats. There is, however, little support for Civita's claim that he did not knowingly and intelligently waive his rights. During the voir dire, Civita's own counsel conceded the adequacy of the "Miranda" warnings that were given. It was brought out that Civita was permitted, after arrest, to call his lawyer, and that he had decided, against the lawyer's advice, to give a statement, which he signed after executing a written waiver of his rights. Civita had himself been a policeman from 1969 to 1973.

On the separate question of whether the statement was preceded by threats and improper inducements, there was a conflict between Civita's testimony and that of agent Ready. Civita testified that Ready had informed him that bail would be set at $250,000 unless he signed a statement, but that bail would be less and the process facilitated if he cooperated. Ready denied this. Rather he testified that, in keeping with his usual practice, he had informed Civita of bail procedures but had said no more. In ruling at the end of the voir dire to admit the statment, the court obviously chose, as it was entitled, to credit Ready's testimony

rather than Civita's. We cannot say that it erred in so doing. We conclude that the statement was properly admitted.

Appellant contends that the district court erred in denying the motion to strike the testimony of a government witness, James Young. Young testified that Nesto had showed him a pistol permit filled out with Nesto's picture, and later drove him to a store where Nesto purchased a pistol for Young, who gave him a rifle in exchange. Later, according to Young, Nesto showed him a blank pistol permit form and offered to sell it for $75. Young testified that, at about the same time, Nesto introduced him to Civita, who brought up the subject of pistol permit forms and told Young that the permit forms were counterfeit and had been produced by xeroxing. Appellant argues that Young's testimony was so tentative, confusing, and full of contradictions as to be both incompetent and inappropriate for jury consideration.

However, we find nothing in the record indicating that Young was so incapable of observation or recollection as to be an incompetent witness. His testimony was, it is true, unclear and vague at times; for example, he changed his mind before concluding that it was Nesto, not appellant, who had offered to sell a blank pistol permit. But it is the jury's province to consider such deficiencies in determining how much weight to give to testimony. The district court did not abuse its discretion in refusing to strike Young's testimony.

Appellant's next claim is that the district court erred in denying his motion for acquittal at the close of the Government's case. Appellant contends the Government failed to make a prima facie case since no evidence was offered that Civita "knowingly and willingly" aided and abetted Nesto in the crimes of acquiring firearms with a forged permit and dealing in firearms without a license.

The law is clear that an aider and abettor no less than a traditional principal must harbor unlawful intent. The aider and abetteor must both participate to some degree in the illegal activity and know that he is taking a step to promote the commission of a crime. He need not, however, know all the details of the plan, nor the specific acts done by the principal. The aider and abettor may be found liable for "any criminal act which, in the ordinary course of events, was the natural and probable consequence of the crime that he advised or commanded." *United States* v. *DeLamotte*, 434 F.2d 289, 293 (2d Cir. 1970); *see McClanahan* v. *United States*, 230 F.2d 919, 925-26 (5th Cir. 1956); *Russell* v. *United States*, 22 F.2d 197, 198-99 (5th Cir. 1955).

In this case there is no issue as to the crimes which Nesto committed,[2] and Civita's own statement provides evidence that he played a key role in facilitating them: he accepted a blank pistol permit and a blank firearms identification card which had been stolen from a police station in Randolph, where he had been an officer for four years; and he gave these forms to Nesto, who was approximately 18 years old. On the issue of intent, Civita's statement goes on to disavow any knowledge of Nesto's plans. Civita said,

> "But I told [Nesto] to destroy [the firearms ID cards] when he was through. . . . I told him I didn't want anything to do with them. And if he got caught it was his problem. . . . I did not know what Nesto would use them for."

See Appendix.

However, even from this it is obvious that Civita recognized that Nesto might be "caught" in an illegal activity as a consequence of using the blank firearms identification

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[2] Nesto, who had pleaded guilty on 13 counts of firearms violations prior to appellant's trial, was not called by either the Government or appellant.

forms. The official purpose of a pistol permit is to allow the holder to buy and carry guns. Firearms are highly dangerous objects whose distribution is regulated. A jury could properly conclude that anyone in Civita's position would have realized that he was facilitating the illegal purchase of firearms and also that the card might be used in some manner to facilitate the illegal dealing in guns. The latter, it is true, may seem less probable than that Nesto would use the card to procure guns for himself. Nonetheless, illegal dealing was a natural, probable and foreseeable consequence of providing the permit. The permit was a basic and essential device for thwarting regulation; Civita should not be heard to complain that he was ignorant of an entirely foreseeable consequence attendant upon its use.

Appellant's final claim is that the district court's instructions were erroneous. The court instructed the jury that it could infer that appellant intended the pistol permit to be used for the buying of guns and dealing in them as a natural and probable consequence of giving the permit to Nesto. As we have just stated, the evidence would support such a determination, and we find no error in the instructions in this respect.

Appellant's remaining objections to the instructions seem to be that the court's statement prejudiced the jury, by indicating that the sole reasonable inference to be drawn from providing a pistol permit is the intention to enable someone to buy a gun. It is true that the court, in explaining how it may be inferred that a person intends the natural and probable consequences of his acts, presented the example of lighting a firecracker, with the intention that it explode. The court stated that the jury could infer "that the purpose of a pistol permit and its sole official purpose is to enable someone to buy a pistol." But the court also added that lighting a firecracker was a "simple example",

and after each statement on what might be inferred the court made it clear to the jury that it need not infer that appellant intended the crimes charged but rather could believe that appellant intended the permit to be used for another purpose other than the buying of guns or dealing in them. Moreover, after the court's initial instructions and appellant's objections were made, the court in further instructions clarified the firecracker analogy, saying "That was only offered to you in a very summary way as a means of trying to describe what I was talking about by natural and probable consequences and is not intended to be descriptive of the circumstances of this case." Viewing the instructions as a whole we think the issue of intent was properly preserved for the jury. We discover no error or prejudice in the court's instructions.

Affirmed.

Appendix

My name is Joseph P. Civita. I live at 8 Crowley Dr., Randolph. I was born in Boston on 5-31-47. My wife is Diane A. Civita and my son Joseph live at the above address. I am self employed. I am formerly a Randolph Police Officer. I resigned from the Randolph Police Force on March 27, 1973. Prior to wrighting this statement, Special Agent Ready and Cook gave me an opportunity to contact my lawyer Harold Carter of Duxbury, phone no. 934-6661, which I did at approximately 9:35 p.m., 1-17-74.

In the spring of 1973 Officer Richard Bennotti of the Randolph Police Department showed me some firearms I.D. cards and pistol permits which he had taken from The Randolph Police Department. He had about 15 or twenty of them. At this time, he gave me one of each Mass. FID card and a pistol permit. I told him I didn't know what I would do with them but he said to take a couple anyway.

I took one Mass. Pistol pirmet and a firearm ID Card. Bennotti told me that he had taken them from the Randolph PD. At this time I was not a Police Officer I had resigned on or about March 27, 1973. Bennotti was a Police Officer at this time. About 2 to 7 week after Robert Nesto of Canton was at my house at 8 Crowley Dr. In conversation he asked if I knew were he could get some IDs. I told him I had some firearms ID cards. I had no use for them, and I told him he could have them. But I told him to distroy them when he was through. He said he would and I gave to Robert Nesto one fid card and one pistol permit. I told him I didn't want anything to do with them and if he got caught it was his problem. A few days later he told me he had bought a single barrel shotgun using the permit. I told him I wanted them back so I could destroy them. He said that he didn't have them available

at this time. and he would destroy them when he got home. I did not know what Nesto would use them for.

I had seen him on two other occasions during the summer, I asked him if he had destroyed the cards and he said that he had. And I have not seen him since.

I do not have a Mass. Pistol Permit, but I do have a FID Card, issued by Officer John Henault, RPD, APP in January, 1973....

I make these statements freely and volintarily with no threats or coercion used against me or promices extend to me. I related to S. A. Ready the facts in the forgoing statment consisting of four pages which I have signed I have been given the opportunity to make corrections and I have initialed each correction made. This statement is true and correct to the best of my knowledge.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 75-1020.

UNITED STATES OF AMERICA,
APPELLEE,

v.

JOSEPH CIVITA,
DEFENDANT, APPELLANT.

JUDGMENT
Entered July 9, 1975

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

DANA H. GALLUP, *Clerk.*

By /s/ FRANCIS P. SCIGLIANO

[cc: Messrs. Nugent and Hammond.]

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-581

JOSEPH CIVITA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his written statement was improperly admitted, that the evidence is insufficient to sustain his conviction, and that the jury instructions were erroneous.

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted on two counts charging that he aided and abetted Robert Nesto unlawfully to purchase twelve firearms, in violation of 18 U.S.C. 2 and

922(a)(6), and unlawfully to deal in firearms, in violation of 18 U.S.C. 2 and 922(a)(1).[1] He was sentenced to two years' imprisonment. The court of appeals affirmed (Pet. App. A).[2]

The evidence at trial showed that petitioner, a former policeman with the Randolph Massachusetts Police Department, obtained a Massachusetts Firearms Identification card and a pistol permit which another policeman had stolen from the Department (IIB-Tr. 2, 6, 53-55).[3] Petitioner gave both documents to co-defendant Nesto who, under an alias, used them to purchase a dozen guns and rifles (I-Tr. 127, 145; IIA-Tr. 158), several of which he subsequently sold in three separate transactions (I-Tr. 116; IIA-Tr. 78-81).

When petitioner was arrested he signed a card acknowledging that he had been advised of his rights and told the arresting agents (I-Tr. 67), "I know all that stuff. I am a police officer. Don't give me that." Petitioner then signed a statement (Pet. App. 13-

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[1] Nesto pleaded guilty to thirteen counts charging that he made false statements and used false identification to purchase guns and that he had unlawfully dealt in firearms. He did not testify at trial.

[2] The judgment of the court of appeals was entered on July 9, 1975 (Pet. App. B). On August 11, 1975, Mr. Justice Brennan granted petitioner's request for an extension of time in which to file a petition for a writ of certiorari to and including September 5, 1975. The petition was not filed until October 16, 1975, however, and is therefore substantially out of time under Rule 22 of this Court's Rules.

[3] "Tr." refers to the three-volume transcript of trial proceedings.

14) that he had given the stolen identification card and permit to Nesto, that he had told Nesto "to destroy them when he was through," and that "if he got caught it was his problem." The statement was admitted after a hearing on its voluntariness (I-Tr. 65-105).

1. Petitioner's contention that his statement was improperly admitted because he allegedly did not knowingly and intelligently waive his rights is refuted by the circumstances at the time of and immediately following his arrest. As the court of appeals observed (Pet. App. 8):

> During the voir dire, Civita's own counsel conceded the adequacy of the "Miranda" warnings that were given. It was brought out that Civita was permitted, after arrest, to call his lawyer, and that he had decided, against the lawyer's advice, to give a statement, which he signed after executing a written waiver of his rights. Civita had himself been a policeman from 1969 to 1973.[4]

2. Petitioner's claim that the evidence was insufficient to support his conviction is without merit. There was no dispute that Nesto had committed the crimes charged or that petitioner had provided Nesto with the stolen documents. On the question of intent, the court of appeals noted (Pet. App. 10-11) that

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[4] In the court of appeals, petitioner also argued that the statement was preceded by threats and inducements. In deciding the issue against petitioner, the court relied upon the trial judge's resolution of a credibility conflict in favor of the arresting agent (Pet. App. 8-9), and petitioner suggests no reason why this resolution was incorrect.

those portions of petitioner's statement in which he attempted to disavow knowledge of Nesto's plans—that he had instructed Nesto to destroy the documents after he had used them and that he had told Nesto that "if he got caught it was his problem"—supported a permissible inference by the jury that petitioner knew that he was facilitating the illegal purchase of firearms when he gave Nesto the stolen papers. As the court of appeals noted (Pet. App. 11):

> [I]llegal dealing was a natural, probable and foreseeable consequence of providing the permit. The permit was a basic and essential device for thwarting [firearms] regulation; Civita should not be heard to complain that he was ignorant of an entirely foreseeable consequence attendant upon its use.

3. With respect to the district court's charge, petitioner says first (Pet. 5) that the court failed to instruct the jury about the meaning of the terms "willfully and knowingly." It is true that the court did not elaborate on these terms in its initial charge, but at the request of defense counsel a supplemental charge (to which no objection was made) fully explaining these terms was given before the jury retired (III-Tr. 141-142).

Petitioner's final challenge to the court's charge is that it improperly instructed on the issue of intent. This claim was correctly answered by the court of appeals, on whose opinion we rely (Pet. App. 11-12):

> Appellant's remaining objections to the instructions seem to be that the court's statement

prejudiced the jury, by indicating that the sole reasonable inference to be drawn from providing a pistol permit is the intention to enable someone to buy a gun. It is true that the court, in explaining how it may be inferred that a person intends the natural and probable consequences of his acts, presented the example of lighting a firecracker, with the intention that it explode. The court stated that the jury could infer "that the purpose of a pistol permit and its sole official purpose is to enable someone to buy a pistol." But the court also added that lighting a firecracker was a "simple example", and after each statement on what might be inferred the court made it clear to the jury that it need not infer that appellant intended the crimes charged but rather could believe that appellant intended the permit to be used for another purpose other than the buying of guns or dealing in them. Moreover, after the court's initial instructions and appellant's objections were made, the court in further instructions clarified the firecracker analogy, saying "That was only offered to you in a very summary way as a means of trying to describe what I was talking about by natural and probable consequences and is not intended to be descriptive of the circumstances of this case." Viewing the instructions as a whole we think the issue of intent was properly preserved for the jury.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

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